Supreme Court, U.S.
FILED
DEC 2 3 2009
OFFICE OF THE CLERK

No. 09-561

In The
Supreme Court of the United States

ROSS PARKHURST and AMY PARKHURST, individually and as guardians and next friends of H.P., a minor child under the age of eighteen,
Petitioners,

v.

STEPHEN TABOR, DANIEL SHUE and COUNTY OF SEBASTIAN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL LESHER
22 LEITCH PLACE
PASSAIC, NJ 07055

Counsel for Petitioners

WILLIAM W. O'CONNOR
Counsel of Record
ADRIENNE L. BARNETT
NORMAN WOHLGEMUTH
CHANDLER & DOWDELL
2900 MID CONTINENT TOWER
401 SOUTH BOSTON AVENUE
TULSA, OKLAHOMA 74103
TEL: (918) 583-7571
FAX: (918) 584-7846
wwo@nwcdlaw.com
abr@nwcdlaw.com

Counsel for Petitioners

December 23, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. Sebastian County Misrepresents the Constitutional Injury, and Therefore the Constitutional Right, at Stake in this Case 3

II. Sebastian County Impermissibly Denies that Prosecutors Are Law Enforcement Officers Involved in Providing Protection to the Public 8

III. Sebastian County Presents a "Policy" Argument that Would Eviscerate Existing Equal Protection Law 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Brown v. Board of Education of Topeka,
347 U.S. 483 (1954) 5

Estate of Macias v. Ihde,
219 F.3d 1018 (9th Cir. 2000) 4, 6, 8, 13

Hillis Motors, Inc. v. Hawaii Auto. Dealers Assn.,
997 F.2d 581 (9th Cir. 1993) 9

In re Missouri v. U.S. Bankruptcy Court for the Eastern District of Arkansas,
647 F.2d 768 (8th Cir. 1981), *cert. denied*,
454 U.S. 1162, 102 S. Ct. 1035, 71 L. Ed. 2d 318 9

In re Universal Life Church, Inc.,
128 F.3d 1294 (9th Cir. 1997), *as amended on denial of rehearing, cert. denied*, 118 S. Ct. 2367, 141 L. Ed. 2d 736 9

Linda R.S. v. Richard D.,
410 U.S. 614, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973) 7

Myers v. County of Orange,
157 F.3d 66 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146, 119 S. Ct. 1042,
143 L. Ed. 2d 49 ..... 6, 7, 10

Navarro v. Block,
72 F.3d 712 (9th Cir. 1995) 6

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville,
508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993) 4

Smith v. Ross,
482 F.2d 33 (6th Cir. 1973) 13

Thurman v. City of Torrington,
595 F. Supp. 1521 (D. Conn. 1984) ..... *passim*

Turner v. Fouche,
396 U.S. 346, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970) 5

Constitutional Provisions

Equal Protection Clause ..... *passim*
U.S. Const. amend. XIV 5, 10

Rules

Fed. R. Civ. P. 12(b) 2

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

A brief in opposition to the Petition for a Writ of Certiorari filed herein has been submitted by Respondent Sebastian County, Arkansas (hereafter, "Brief in Opposition").

Petitioners respectfully submit that the Brief in Opposition contains new argument that requires a reply, particularly because Sebastian County seriously misstates existing law and advances a "policy" argument that would eviscerate the fundamental principle enunciated in case law spanning twenty-five years: that crime victims belonging to a disfavored class are entitled to the same quality of justice from state law enforcement officers enjoyed by everyone else. Accordingly, Petitioners respectfully submit the instant reply brief pursuant to Rule 15.6 of this Court.

As the Court is aware, this case involves a claim under the Equal Protection clause arising from the deliberate abandonment of the prosecution of Chad Belt – the biological father and rapist of Petitioner H.P., a minor – by Respondents (who are prosecutors and their supervising county) because of class-based discrimination against incest victims such as H.P.

Sebastian County makes three novel – and erroneous – arguments in opposition to certiorari. First, Sebastian County misrepresents the Constitutional injury H.P. has suffered, and therefore the Constitutional right at stake. It claims the only injury asserted by Petitioners is the non-prosecution of Chad Belt. That is false. Petitioners' injury consisted in discrimination by Respondents – law enforcement officers – that manifested in Respondents' indefensible abandonment of the prosecution of Chad Belt, merely because his victim was also his minor daughter and Respondents did not like to pursue incest cases. Indeed, at the dismissal stage, the trial court was required to accept as true the allegation that it was the policy or practice of the Respondents not to pursue prosecution of cases of incestuous sexual assault under circumstances in which other felonies would have been fully prosecuted. (Fed. R. Civ. P. 12(b).)

Second, Sebastian County – without any authority whatsoever – asserts that prosecutors are not law enforcement officers, do not contribute to the protective service of law enforcement as do police officers, and therefore are not governed by the same equal-protection principles that they admit govern law enforcement officers other than prosecutors. This is preposterous: Prosecutors are no less law enforcement officers than police, are part of the same justice system that exists to protect the public, and are bound by the same Constitutional constraints that govern all law enforcement.

Finally, Sebastian County insists that as a matter of policy this Court should not recognize the right of crime victims to assert equal protection claims against prosecutors lest too many such claims arise in the future. This argument is belied by history and would, if accepted, eviscerate a quarter-century's worth of existing precedent affirming the standing of crime victims to sue law enforcement officers for class-based discrimination.

ARGUMENT

I. Sebastian County Misrepresents the Constitutional Injury, and Therefore the Constitutional Right, at Stake in this Case

Sebastian County flagrantly misstates the Constitutional claim at the core of this lawsuit. Its lawyers insist:

> The Petitioners' sole claim against the Respondents . . . is that the Constitutional rights of a minor, referred to as "H.P.," have been violated because the Respondents did not prosecute H.P.'s alleged molester for his alleged sexual assault(s) on H.P.

(Brief in Opposition, p. 4.) This is simply untrue. Petitioners' claim is, instead, that law enforcement officers violated H.P.'s right to equal protection of the laws by refusing to prosecute the man who

sexually assaulted her[1] because of class-based discrimination against H.P. – specifically, because H.P. is a victim of incest as opposed to the victim of an assault by a stranger. The difference between these two positions is crucial. It is also clearly established by existing case law.

As recently as 2000, the Ninth Circuit Court of Appeals – in a decision crucial to Petitioners' claims in this case – explicitly refuted the claim now offered by Sebastian County. In upholding a crime victim's standing to sue law enforcement officers for ignoring her case, to her harm, because she belonged to a disfavored class – exactly the posture of the instant matter – the Ninth Circuit emphasized that the legal injury was *not* the fact that her assailant was not arrested; it was the *discrimination* she suffered when law enforcement officers made a class-based decision not to pursue her assailant. *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000). *Macias* cannot reasonably be interpreted in any other way.

In fact, this Court has likewise stressed this exact distinction, stating in *Northeastern Florida*

---

[1] Sebastian County attempts to soften the case against Belt by suggesting that he remains innocent because – thanks to Respondents' actions – he was never fully prosecuted. (Brief in Opposition, p. 3.) Of course, the facts of Belt's repeated sexual assaults on his young daughter, including the documented genital and anal injuries they caused, are detailed in the complaint and must be assumed true for the purpose of this appeal, following a dismissal under Rule 12(b). Indeed, a jury found Belt liable for battery and outrage as a result of the overwhelming evidence.

Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 666, 113 S. Ct. 2297, 2303, 124 L. Ed. 2d 586, 597 (1993) that "[t]he 'injury in fact' in an equal protection case . . . ***is the denial of equal treatment***." [Emphasis added.] The point was made still earlier in *Turner v. Fouche*, 396 U.S. 346, 362, 90 S. Ct. 532, 541, 24 L. Ed. 2d 567, 579-80 (1970). Again, no reader of these holdings could fail to see that class-based *discrimination* – not non-prosecution – is the injury at stake in the case at bar, and that this injury establishes the Petitioners' standing to sue the law enforcement officers who discriminated against H.P.

The absurdity of Sebastian County's argument may be illustrated by an analogy to almost any equal-protection case on record. For example, if Sebastian County were correct, the African-American plaintiffs in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), were not complaining of discrimination by state actors that violated their Fourteenth Amendment right to equality in education; according to Sebastian County, they were merely asserting a Constitutional right to go to school!

Sebastian County's pretense that Petitioners herein cannot sue state law enforcement officers under the Fourteenth Amendment for *their* discriminatory actions fares no better.[2] The

---

[2] Notably, before the District Court, Respondents took the position that they had no discriminatory policy; clearly, they

standing of crime victims to sue law enforcement officers who ignore or slight their cases due to class-based discrimination is, in fact, well settled. Besides *Estate of Macias v. Ihde, supra*, precedents include: *Navarro v. Block*, 72 F.3d 712, 715-17 (9th Cir. 1995); *Myers v. County of Orange*, 157 F.3d 66, 74-75 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49; and *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527-28 (D. Conn. 1984).

Myers v. County of Orange, 157 F.3d 66 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49, is worth particular attention, for in that case the Second Circuit Court of Appeals upheld the standing of an alleged crime victim to challenge a *prosecutorial policy* in an equal-protection suit against a county – a posture exactly parallel to Petitioners' claims against Sebastian County herein.

Sebastian County concedes that the plaintiff in *Myers* was, like H.P. in this case, a crime victim. (Brief in Opposition, p. 14.) This completes the symmetry between that case and the instant suit and flatly disproves Sebastian County's suggestion that discrimination in prosecutorial policy never gives victims standing to sue under the Equal Protection clause.

---

are now forced to concede that for the purpose of this appeal the existence of such a policy must be assumed.

Due to the importance of its holding, the basic facts in *Myers* are worth summarizing. The plaintiff in that case reported to law enforcement that two people had attacked him; unknown to him, the alleged attackers had already called to make a complaint against *him*. Plaintiff's alleged assailants were never prosecuted. The plaintiff then brought an equal-protection action against the county that directed the local prosecutors, alleging that the county had promulgated a prosecutorial policy that dealt with criminal complaints on a first-come, first-serve basis, and that this policy violated his right to equal protection of state law. In upholding his standing to sue (157 F.3d at 74-75), the Second Circuit plainly recognized what Sebastian County now denies: that crime victims have standing to challenge prosecutorial policy that discriminates against a disfavored class to which the victims belong. *Myers* therefore completely disposes of Sebastian County's argument.

It is undisputed that, ***in the absence of class-based discrimination by law enforcement officers*** as in this case, a crime victim lacks standing merely to demand the prosecution of an alleged criminal. Yet that is all, as Sebastian County concedes, that the cases it cites actually hold. (Brief in Opposition, pp. 8-9.) Not one of those cases discusses an equal-protection challenge to discrimination by state actors – the essence of the instant case. (One of them, *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973), even stresses the absence of any consideration of equal protection. *Id.*, 410 U.S. at

615, 616, n. 1.) Sebastian County utterly ignores the case law that explicitly distinguishes between such a situation (in which a victim lacks standing against law enforcement officers) and a case that does arise from class-based discrimination by law enforcement officers (in which a victim *does* have such standing). *Thurman*, 595 F. Supp. at 1527-28; *Estate of Macias*, 157 F.3d at 1028.

Sebastian County's insistence that Petitioners claim standing based "solely" on the non-prosecution of Chad Belt brazenly misrepresents Petitioners' position and, more importantly, the relevant law.

II. Sebastian County Impermissibly Denies that Prosecutors Are Law Enforcement Officers Involved in Providing Protection to the Public

Sebastian County just as flagrantly ignores the law when it claims that the right of crime victims to sue law enforcement officers for their class-based discrimination does not extend to suits against prosecutors. According to Sebastian County's unique view of law enforcement, prosecutors are not law enforcement officers, and are not involved in "protective services," because the "[p]rosecution of a criminal offender . . . is not a 'protective service' provided to other citizens by the police." (Brief in Opposition, p. 15.) Sebastian County presents absolutely no case law in support of this astonishing premise -- and there is none. Indeed, *Thurman v. City of Torrington* – the progenitor of

this entire line of cases – articulated its holding in terms that apply to *all* law enforcement officers, regardless of type or title:

> ***It is well settled that the equal protection clause is applicable . . . to discriminatory governmental action in administration and enforcement of the law.***

595 F. Supp. at 1527-28 [emphasis added]. Given this broad and unequivocal language, the onus is on Sebastian County to distinguish – if it can – between prosecutors and other law enforcement officers in the context of the state's obligation to provide equal protection of its criminal laws to all classes of citizens. Sebastian County cannot possibly do so.

First, there is ample case law establishing that prosecutors *are* law enforcement officials – indeed, an integral part of the state's "police power." *See In re Universal Life Church, Inc.*, 128 F.3d 1294, 1297 (9th Cir. 1997), *as amended on denial of rehearing, cert. denied*, 118 S. Ct. 2367, 141 L. Ed. 2d 736; *Hillis Motors, Inc. v. Hawaii Auto. Dealers Assn.*, 997 F.2d 581, 591 (9th Cir. 1993), *citing In re Missouri v. U.S. Bankruptcy Court for the Eastern District of Arkansas*, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162, 102 S. Ct. 1035, 71 L. Ed. 2d 318. It obviously follows that prosecutors are bound by the same Constitutional constraints that govern other law enforcement

officers – including the Equal Protection clause. There is not a single case that suggests otherwise.

Second, the holding of *Myers v. County of Orange, supra* – a case actually cited by Sebastian County – demonstrates unmistakably that a victim's right to sue law enforcement officers extends to prosecutorial policies as well as to police conduct.

Third, Sebastian County's argument makes no sense: if prosecutors are not law enforcement officers, what are they? If they do not participate in the "protective service" offered by law enforcement, what is it they do for their communities? If prosecuting an offender is not part of protecting society, why is arresting the offender? Sebastian County offers no answer to these questions – and no answer exists. In truth, law enforcement without prosecutors would make no more sense than building half a bridge.

III. Sebastian County Presents a "Policy" Argument that Would Eviscerate Existing Equal Protection Law

Finally, Sebastian County suggests that even though Petitioners are logically entitled to vindicate their Fourteenth Amendment rights against prosecutors – just as they would be against any other law enforcement officers – this Court should deny them that Constitutional right as a matter of policy. Sebastian County worries out loud about the "practical problem" posed by applying the

Equal Protection clause to law enforcement officers' discrimination against incest victims like H.P.:

> [I]f "alleged" crime victims were allowed to sue prosecutors under the equal protection clause [for class-based discrimination against the victim] . . . a torrent of litigation . . . would inevitably follow. . . . [T]he string of cases in exactly the same procedural posture would no doubt go on for pages.

(Brief in Opposition, p. 6.) Sebastian County's cynical "concern" is illusory and hypocritical.

First, there is no evidence that a flood of prospective litigation waits on the outcome of this case. Quite the contrary. To begin with, such litigation could only arise if prosecutors violate well-established equal protection principles. Besides, federal case law established crime victims' right to sue law enforcement officers for class-based discrimination fully twenty-five years ago. Yet no one could claim today that *Thurman v. City of Torrington* and its progeny have unleashed a "torrent" of cases on the federal courts in all that time. Nor has anyone before Sebastian County had the audacity to claim that, even if some similar cases were to follow this one,[3] the federal courts

---

[3] Sebastian County falsely asserts that "anyone can be an alleged victim, merely by saying that they are one." (Brief in Opposition, p. 7, n. 2.) In reality, there is nothing automatic about defining a disfavored class for equal protection purposes – in this case, Petitioners have set forth considerable evidence of the discrimination involved – and the

would rather have lighter dockets than a Constitutional criminal justice system. Neither "concern" is grounded in the realities of justice. The actual consequence of the holding in *Thurman* was improved law enforcement procedure; the only likely effect of a holding in favor of Petitioners in this case is a similar improvement in the conduct of any prosecutors' offices that have hitherto discriminated against the victims of incestuous assaults. Few will agree with Sebastian County that such a prospect should trouble the federal courts.

Second, the "policy" suggested by Sebastian County defies logic. It would create a special immunity from the Equal Protection clause reserved solely for prosecutors and explicitly excluding all other law enforcement officers. It would set prosecutors, and only prosecutors, above the Equal Protection clause. At the same time the federal courts require all other law enforcement officers to dispense criminal justice equally to all classes of victims, this "policy" would license the most egregious and overt discrimination against the members of any class, so long as it happened to be committed by prosecutors. Sebastian County would have this Court permit prosecutors to refuse to pursue any crime at all, solely thanks to the race, religion or gender of the crime victim – or, as in this case, her status as a victim of incest. There

---

detailed complaint also includes overwhelming evidence of Belt's repeated assaults upon H.P.

is no conceivable justification for embracing such an approach.

Third, setting prosecutors above the Equal Protection clause would inevitably undermine the hard-won rights of crime victims to demand equal justice from other law enforcement officers. Though police are under a "statutorily imposed duty to enforce the laws equally and fairly" (*Smith v. Ross*, 482 F.2d 33, 36 (6th Cir. 1973)), that "duty" would erode to nothing if discrimination against this or that class of victims could be freely shifted to the next rung of the law enforcement apparatus. Was the broad and emphatic language of *Thurman* and *Estate of Macias* only supposed to mean that while police must conduct their investigations and make their arrests in conformity with the Constitution, prosecutors may discriminate as much as they like against any class of victims they choose? Such a rule would eviscerate the extensive federal case law – stretching back twenty-five years – that guarantees crime victims the right to nondiscriminatory handling of their cases by law enforcement officers. Surely such a result cannot be justified.

CONCLUSION

That Sebastian County's only objections to the arguments made by Petitioners in seeking certiorari are so plainly unfounded – indeed, are directly contrary to law – underscores the rightness and the urgency of Petitioners' plea for this Court's intervention. Petitioners have already asked this

Court to protect a quarter-century's worth of precedents ensuring the equal protection rights of all crime victims. In light of Sebastian County's Brief in Opposition, this Court's action is even more plainly required to protect the rights of crime victims from evisceration by public officials. This Court should make clear that 1) a violation of equal protection rights by prosecutors is a Constitutional injury, 2) prosecutors are law enforcement officers, and 3) federal courts are the proper venue to redress constitutional violations such as the egregious actions of the prosecutors in this case.

Respectfully submitted,

William W. O'Connor
Attorney of Record
Adrienne L. Barnett
Norman Wohlgemuth Chandler & Dowdell
2900 Mid Continent Tower
401 South Boston Avenue
Tulsa, Oklahoma 74103
(918) 583-7571 - Telephone
(918) 584-7846 - Facsimile
wwo@nwcdlaw.com
abr@nwcdlaw.com

Michael Lesher
22 Leitch Place
Passaic, NJ 07055

Attorneys for Petitioners